No. 21,527

IN THE

United States Court of Appeals

For the Ninth Circuit

BRENT L. SELLICK,
Appellant,

vs.

CLIPPER YACHT COMPANY,
a corporation,
Appellee.

BRIEF FOR APPELLEE

I. LAURENCE POPOFSKY,
URTIS M. CATON,
HELLER, EHRMAN, WHITE & MCAULIFFE,
44 Montgomery Street,
San Francisco, California 94104,
Attorneys for Appellee.

INAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Codes

Constitutions

Rules

Statutes

Texts

No. 21,527

IN THE

United States Court of Appeals

For the Ninth Circuit

BRENT L. SELLICK,

Appellant,

vs.

CLIPPER YACHT COMPANY, a corporation,

Appellee.

BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the Northern District of California which dismissed appellant's First Amended Libel primarily on the ground that appellant was precluded by the principles of res judicata from relitigating matters finally determined in an earlier action commenced by appellant against appellee involving the same subject matter in the courts of California.

The controversy has its genesis in appellee's attachment and attempted execution sale of the vessel "Hazzard II" in proceedings originally instituted by Clipper Yacht Company against appellant's conditional vendee, Frank Addison Helton, in the Municipal Court. Central Judicial District of Marin County, State of California. Appellant Sellick, in turn, filed

an action in the Superior Court of the State of California in and for the County of San Mateo against appellee contending that his rights as conditional vendor had been infringed by reason of the attachment. Appellant's claims were rejected after trial by the Court. The Findings of Fact, Conclusions of Law and Judgment After Court Trial filed October 27, 1964 in the California Superior Court proceedings form the predicate for appellee's res judicata defense.

So far as pertinent to jurisdiction, appellant appears to contend that he is not barred by res judicata since the proceedings in his Superior Court action were not before "a court applying admiralty law; inasmuch as no Court, other than a Court sitting in admiralty in rem has the jurisdiction to make any changes in ownership of a vessel". O.Br. p. 9.

Jurisdiction of the case below was invoked under 28 U.S.C. §1333. Jurisdiction of this Court is founded on 28 U.S.C. §§1291 and 1294.

STATEMENT OF THE CASE

A. The Background as Found by the California Superior Court.

Appellant sold the "Hazzard II" to Frank Addison Helton on or about October 2, 1957 on a conditional sales contract. On or about November 14, 1958 Helton entered into a contract with appellee for the berthing of the "Hazzard II" at the yacht harbor facilities operated by Clipper Yacht Company.[1] How-

[1]Unless otherwise indicated, facts relating to the nonprocedural matters appear in the Findings of Fact and Conclusions of Law filed October 27, 1964 in the San Mateo Superior Court. See First Supplemental Record on Appeal.

ever from and since June 1, 1962 Helton has not paid appellee for the wharfage and anchorage of the vessel.

On or about June 24, 1963 Clipper Yacht Company filed Action No. 20493 in the Municipal Court, Central Judicial District of Marin County, State of California, against Frank Addison Helton and the unknown co-owners of the vessel "Hazzard II" pursuant to the California Code of Civil Procedure §813 et seq. In accordance with those provisions, Clipper Yacht Company caused the "Hazzard II" to be attached by the Sheriff's Office of the County of Marin. Following service by publication and default by defendant Helton, judgment was entered on October 25, 1963 in favor of Clipper Yacht Company and against Frank Addison Helton for the accrued wharfage debt. The judgment also authorized Clipper Yacht Company to cause the "Hazzard II" to be sold in satisfaction of the debt.

Under authority of the Municipal Court Judgment, Clipper Yacht Company directed the Sheriff of Marin County to proceed to sell the "Hazzard II". Sale was duly noticed in accordance with the applicable provisions of law for December 26, 1963. However, at the time appointed for sale appellant Sellick advised the Sheriff of Marin County that he was legal owner of the vessel and desired to file a third party claim pursuant to California Code of Civil Procedure §689(b).[2]

---

[2]It may be observed parenthetically that appellant's suggested "solution" to the controversy (O.Br. 8) would have been effectuated by the vessel's sale on December 26, 1963 but for appellant's decision to file the third party claim.

In due course appellant Sellick lodged his third party claim with the Sheriff which claim was duly honored by appellee Clipper Yacht Company. On or about March 17, 1964 the "Hazzard II" was released by the Sheriff to appellant Sellick as legal owner by formal notice transmitted to and received by appellant in March 1964. (Finding of Fact No. 11.)

At all times during the period that the "Hazzard II" was under attachment, appellant Sellick had actual knowledge of the attachment and was entitled to obtain its release pursuant to the statutory provisions of California Code of Civil Procedure §813 et seq. and/or California Code of Civil Procedure §689(b). (Finding of Fact No. 12.) More, from the date of attachment through the date of release on Sellick's third party claim, the fair market value of the "Hazzard II" remained a constant $1500. (Finding of Fact No. 14.)

Since the date of release to appellant, Clipper Yacht Company, through its counsel of record, has repeatedly asked Sellick to remove the "Hazzard II" from appellee's yacht harbor facilities. On each and every occasion, however, appellant Sellick has replied that the Court decisions adverse to him were erroneous and that he would not take possession of the vessel or remove it from Clipper Yacht Company's facilities. Since the March 17, 1964 release the vessel has remained berthed at appellee's facilities but no payment therefor has been made.

B. The Antecedent Legal Proceedings.

After filing his third party claim with respect to the "Hazzard II", Sellick filed Action No. 108357 in the Superior Court of the State of California in and for the County of San Mateo on June 10, 1964. So far as it relates to Clipper Yacht Company, the complaint alleges that appellee and others "wrongly deprived plaintiff of the use and possession of [the Hazzard II] and converted the same to their own use". General damages in the sum of $8,000 were prayed.

Clipper Yacht Company answered by denying liability and counterclaimed for wharfage and anchorage due since June 1, 1962. Following trial before the Honorable James T. O'Keefe, judgment was entered on October 27, 1964 in favor of Clipper Yacht Company with respect to all claims asserted in appellant Sellick's complaint. The counterclaim was dismissed without prejudice. The judgment thus entered followed the entry of findings of fact, which are summarized in relevant part above, and conclusions of law.

Appellant Sellick did not file a timely notice of appeal with respect to the October 27, 1964 Superior Court judgment. That judgment is thus final.

Also following the appearance of appellant Sellick as third party claimant, appellant was served as a party defendant in the original Municipal Court proceeding pending in Marin County. Issue was joined by way of answer (Record p. 17) and trial was held before the Honorable Alvin H. Goldstein, Jr. On

November 27, 1965 judgment was entered in favor of Clipper Yacht Company and against appellant Sellick in the sum of $625, representing the reasonable value of the wharfage and dockage of the "Hazzard II" for the period from the March 17, 1964 release to the date of trial. (Record p. 27.) Appellant Sellick attempted to appeal the Municipal Court judgment on February 16, 1966 but the appeal was dismissed as untimely filed. Sellick's petition for certification to the Court of Appeal of the State of California was denied on October 5, 1966. (O.Br. p. 6.) Accordingly, the Municipal Court judgment is also final.[3]

C. The Proceedings Below.

On September 20, 1965 appellant Sellick filed his initial pleading in the United States District Court for the Northern District of California. (Record pp. 1-8.) The libel purports to state three causes of action although all are predicated upon the same factual circumstances. At base, libelant alleges that appellee invaded his property rights by attaching the "Hazzard II" in the original Marin County proceedings brought to collect the unpaid wharfage debt from libelant's conditional vendee.

The first cause of the original libel appears to be based on the theory that appellant is entitled to recover the "rental value" of the "Hazzard II" for

[3]It would seem that the claims at bar constitute compulsory counterclaims in the Municipal Court action under California Code of Civil Procedure §439. However, since the earlier California Superior Court judgment rests on the same facts, any estoppel arising from Sellick's failure to counterclaim is of academic interest only.

appellee's alleged "use" of the vessel from June 1, 1962 through at least October 1, 1965, or "until respondent releases it to Frank Helton or Virginia Helton". The nature of the purported "use" is nowhere described. Libelant shifts his damage theory in the second cause to seek compensation for appellee's alleged "negligence" in not drydocking the vessel while it was subject to attachment. This purported cause nowhere alleges that appellees were under a duty to drydock the vessel; nor does it state facts which could explain how such a duty could extend beyond the date of the vessel's release to Sellick as third party claimant. The purported third cause is based on the theory that Clipper Yacht Company interfered with vendor Sellick's rights in the vessel by attaching the same, thereby perpetrating the tort of conversion.

On October 12, 1965 appellee Clipper Yacht Company moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. (Record pp. 9-12; First Supplemental Record on Appeal.) The motion was based on the contention that the libel was barred by virtue of the findings and judgment entered in the San Mateo Superior Court proceedings.[4]

---

[4]The judgment roll in the San Mateo Superior Court action was placed before the United States District Court for the Northern District of California by way of the Affidavit of M. Laurence Popofsky filed October 12, 1962. This Affidavit was sufficient to enable the Court to take judicial notice of the prior proceedings between the parties. See *Sears, Roebuck & Co. v. Metropolitan Engravers, Ltd.*, 245 F.2d 67 (9th Cir. 1956); Fed. R.C.P. 43a; 5 Moore's Federal Practice 1343; California Evidence Code §§452 (d) and 453. The procedure also constitutes substantial compliance

On January 7, 1966 the Honorable William T. Sweigert entered an interim order requesting additional information including, in particular, "why libelant has not regained possession of the 'Hazzard II' since March 17, 1964 when, according to the judgment of the San Mateo Superior Court, the vessel was released to him". (Record pp. 19-20.) Appellant Sellick responded to the interim order on January 26, 1966 (Record pp. 21-25) and Clipper Yacht Company responded on January 19, 1966 (Second Supplemental Record on Appeal) and on February 1, 1966 (Record pp. 26-27). Appellee's response stressed that Clipper Yacht Company had repeatedly asked appellant Sellick to remove the vessel from its yacht harbor facilities following the March 17, 1964 Sheriff's return but that appellant steadfastly refused to do so because he believed the state Court judges to be in error.[5]

On May 16, 1966 the Honorable William T. Sweigert entered his Memorandum of Decision dismissing

---

with the provisions of 28 U.S.C. 1738. While appellant Sellick proffers numerous recollections of events occurring during the long course of the controversy (few of which correspond with the recollections of counsel for Clipper Yacht Company) Sellick has never contested the authenticity of the Superior Court judgment roll documents placed before the Court below.

[5]Appellee's January 19, 1966 response to the interim order included the Affidavit of M. Laurence Popofsky, one of appellee's attorneys, in which affiant stated:

> "Since March 17, 1964 respondent Clipper Yacht Company, through your affiant, has repeatedly asked libellant Brent L. Sellick to remove the vessel 'Hazzard II' from the yacht harbor facilities of respondent. On each and every occasion libellant Sellick has replied that the Superior Court decision in San Mateo County was wrong and that he would not take possession of the vessel or remove it from respondent's yacht harbor facilities. Since March 17, 1964 the vessel has been berthed and remains berthed at Clipper Yacht facilities."

the libel. (Record pp. 28-32.) In the opinion of Judge Sweigert, all claims with respect to acts occurring prior to the San Mateo Superior Court judgment were barred; that bar, however, might not extend "to libellant's claims of unauthorized use of the vessel by respondent and damage to the vessel as a result of respondent's negligence occurring subsequent to the date of said judgment". Since the motion for summary judgment was narrowly based on the doctrine of estoppel by judgment, leave was accorded to file an amended libel alleging a cause or causes of action "based on unauthorized use of the vessel by respondent and damage to the vessel as a result of respondent's negligence occurring *subsequent* to October 27, 1964". (Emphasis in original.)

On June 15, 1966 appellant Sellick filed a First Amended Libel. (Record pp. 33-38.) The amended pleading repeats virtually verbatim the first two causes of action of the original libel; no new facts with respect to negligent acts or unauthorized use are pleaded. However, the damages alleged differ: the first cause reduces the claim for rental from $15,800 to $7,900, the amended figure supposedly relating to the October 27, 1964-June 27, 1966 period only; inexplicably, the damages prayed with respect to the second cause are increased from the original $11,375 to an amount "in excess of $14,463.21".

The amended pleading contains no count for conversion, whether allegedly occurring prior to the San Mateo Superior Court judgment or after.[6]

---

[6]Contrast Appellant's Opening Brief, p. 10.

On July 15, 1966 appellees moved for dismissal of the amended libel pursuant to Rule 12(b)(6) and for summary judgment pursuant to Rule 56. (Record pp. 39-48.) The motion to dismiss was based upon the failure of appellant to file an amended pleading stating facts sufficient to constitute a cause of action either within the framework of the interim order or otherwise; the motion for summary disposition was based upon all documents previously filed, including the affidavits of appellee's counsel filed October 12, 1965 and January 19, 1966. These motions were denied without prejudice to renewal at a later date by the Honorable Stanley A. Weigel on August 1, 1966.[7] (Record p. 53.)

On September 7, 1966 appellee renewed its motions of July 15, 1966 based upon the same record, together with a new affidavit of M. Laurence Popofsky substantially repeating the substance of the January 19, 1966 affidavit. (Record pp. 61-65.) On October 4, 1966 the Honorable George B. Harris entered his Order granting respondent's motion on all grounds urged. (Record p. 66.) This appeal followed on November 4, 1966. (Record p. 67.)

---

[7]The denial was based upon a technical deficiency involving the absence of a notarization in the affidavit of M. Laurence Popofsky filed January 19, 1966. (See Record, p. 55, Reporter's Trans. 2.) Affiant was out of the country at the time of oral arguments before Judge Weigel and was thus unable to cure the defect in open court. Appellee is at a loss to understand appellant's reference to this matter appearing at page 13 of the Opening Brief.

QUESTION PRESENTED

Are appellant's claims barred by reason of the findings and the judgment entered in the Superior Court of San Mateo County coupled with the unchallenged fact that appellant has consistently refused to remove the "Hazzard II" from appellee's yacht harbor facilities at all times since the formal return of the vessel to appellant as third party claimant?

SUMMARY OF ARGUMENT

(1) The doctrine of estoppel by judgment applies to the findings and judgment entered in the San Mateo Superior Court in appellant's prior action against appellee. Appellant's state Court action did not infringe upon the exclusive jurisdiction of a federal admiralty tribunal.

(2) All claims advanced by appellant in both the original and amended libel have been finally concluded adversely to appellant in the state Court proceedings. So far as appellant attempts to advance a claim on the basis of facts occurring after the state Court judgment appellant is barred and estopped from recovery by reason of the unchallengeable state Court findings and the unquestioned fact that since March 17, 1964 appellee has repeatedly asked libelant Sellick to remove the "Hazzard II" from appellee's yacht harbor facilities but appellant has refused to do so.

ARGUMENT

As seen, libelant initially challenged appellee's attachment of the "Hazzard II" before the Superior Court of San Mateo County. There, after a Court trial, findings were entered establishing, *inter alia,* that at all relevant times libelant possessed the power under California law to obtain possession of the vessel by filing a third party claim under California Code of Civil Procedure §689(b). In fact, Sellick did precisely that on or about December 26, 1963. Thereafter, on or about March 17, 1964, the "Hazzard II" was formally released to third party claimant Sellick "as owner" by the Sheriff of the County of Marin. Inexplicably, Sellick thereafter refused to take possession of the vessel, electing instead to sue appellee for conversion.

But the Superior Court of the State of California would have none of it. In findings of fact and conclusions of law supporting the now final judgment, that Court held that appellee's attachment was proper, that no conversion occurred, that Sellick had incurred no damages even if there had been a technical conversion, that Sellick was barred from seeking damages by reason of the availability of third party claim procedures, that Sellick elected his remedy by lodging the third party claim with the Sheriff's Office of Marin County thereby effectuating a return of the vessel, and that, in all events, Sellick was estopped by his conduct from pursuing his claims against Clipper Yacht Company.

Now, defying the established principles of estoppel by judgment, appellant Sellick, appearing *pro se,* seeks to relitigate the claims already rejected by the forum of his own selection. To be sure, appellant Sellick has refurbished his claims with new damage theories in the hopes of evading the various tenets of the doctrine of res judicata. But such refurbishment aside, appellant's claims necessarily rest on the premise that he is entitled to relitigate both the facts and issues heard by the state Court. The determination that he may not do so, embodied in the judgment below, should be affirmed.

I.

THIS COURT SHOULD ATTRIBUTE ESTOPPEL EFFECTS TO THE FINDINGS AND JUDGMENT ENTERED IN THE PRIOR CALIFORNIA SUPERIOR COURT ACTION.

Appellant Sellick has had his day in Court—indeed, in a forum of his own choosing. He is entitled to nothing more.

The operative principles were established beyond all controversy in *Baldwin v. Iowa State Traveling Men's Assn.,* 283 U.S. 522, 75 L.Ed. 1244, 51 S.Ct. 517 (1931) where the Court said:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the results of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in

> every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause." 283 U.S. at 525-6, 75 L.Ed.2d at 1247.

Under the full faith and credit clause of the United States Constitution (Article IV, Section 1), under the federal statute enacted to implement this constitutional provision (28 U.S.C. §1738) and under the principles of res judicata, this Court should accord dispositive effect to the final determinations of the California Superior Court.

Appellant, of course, recognizes the difficulty posed by the doctrine of estoppel by judgment. His putative escape from its effects consists of the argument that the state Court lacked jurisdiction over appellant's own suit inasmuch as a state Court cannot apply admiralty law "in an in rem action or anything affecting the vessel itself, including its title". (O.Br. p. 10; see also p. 13.) As appellee interprets the argument, appellant appears to believe that the state Court lacked jurisdiction over the subject matter of the Superior Court *conversion action* since appellee's *original attachment* affected or touched the title to the vessel—a matter he believes exclusively within federal maritime jurisdiction. Appellant's argument thus comes to this: having erred in filing his conversion action in a state Court thereby putting appellee in jeopardy, he is nonetheless entitled to relief from his mistake and may relitigate the entire matter in a federal forum.

While appellant's argument answers itself, it is appropriate to note those general principles which negate it in its entirety.

In the first place, appellant properly invoked the jurisdiction of the Superior Court of the State of California in his conversion action against Clipper Yacht Company. Under 28 U.S.C. §1333 libelant Sellick had the right to commence a proceeding *in personam* with respect to a maritime cause of action in either a state Court or a federal Court. *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 90 L.Ed. 1099, 66 S.Ct. 872 (1946); *Reynolds v. Royal Mail Lines Ltd.,* 147 F.Supp. 223 (S.D. Cal. 1956); *Sun Harbor Marina Inc. v. Sellick,* 250 Adv.Cal.App. 347 (April 1967).[8]

Even were it possible that Sellick's first action exceeded the subject matter jurisdiction of California Courts thereby infringing upon the exclusive jurisdiction of the federal judiciary, the Superior Court's determination that it had jurisdiction to adjudicate the matter before it—a determination inherent in the judgment—is binding and conclusive. As stated by Mr. Justice Brandeis in *American Surety Co. v.*

[8]It is equally clear that, as the Superior Court of the State of California held, the original Marin County Municipal Court proceeding was within the jurisdiction of that Court. While federal admiralty courts have exclusive jurisdiction over maritime *in rem* proceedings in which the vessel is treated as the offender, attachment proceedings in a debt action in state Court do not infringe upon federal jurisdiction even though the property attached in connection with those proceedings be a vessel. *Rounds v. Clover Boat Foundry & Machine Co.,* 237 U.S. 303, 59 L.Ed. 966, 35 S.Ct. 596 (1915); *Olsen v. Birch & Co.,* 133 Cal. 479, 65 P. 1032 (1901); *Arques v. National Superior Co.,* 67 Cal.App.2d 763, 155 P.2d 643 (1945). The original Marin County action resulted in an *in personam* money judgment fully within the jurisdiction of the California Courts.

Baldwin, 287 U.S. 156 at 166, 53 S.Ct. 98, 77 L.Ed. 231, at 238 (1932):

> ". . . The principles of res judicata apply to questions of jurisdiction as well as to other issues."

See also *Durfee v. Duke,* 375 U.S. 106, 11 L.Ed.2d 186, 84 S.Ct. 242 (1963) applying this general rule to the issue of subject matter jurisdiction as well as jurisdiction over a defendant's person.

Conceivably, appellant desires to argue that there exists some exception to the applicability of res judicata here deriving from doctrines peculiar to federal maritime law. But appellant suggests no reason—and appellee is aware of none—for declining to apply the traditional rules of estoppel by judgment in the context of a controversy touching matters arguably maritime in character. There can be no doubt that res judicata traditionally applies to libels brought within the maritime jurisdiction of a federal Court. See, *e.g., Koziol v. The Fylgia,* 230 F.2d 651 (2d Cir. 1956); *cert. denied,* 352 U.S. 827 (1956); Restatement of Judgments, § 63, comment b, illustration 4. In other contexts actions within the exclusive jurisdiction of a federal Court have been held barred by virtue of findings and judgments entered in state Court proceedings arising out of the same or related subject matter. See, *e.g., Vanderveer v. Erie Malleable Iron Co.,* 238 F.2d 510 (3d Cir. 1956); *cert. denied,* 353 U.S. 937, 1 L.Ed.2d 760, 77 S.Ct. 815 (1956) (patent infringement action within exclusive jurisdiction of federal Court held barred by findings and judgment

in former state Court suit on a license contract); *Connelly v. Balkwill,* 174 F.Supp. 49; (N.D. Ohio 1959), *aff'd per curiam,* 279 F.2d 685 (6th Cir. 1960). (Rule X 10B-5 action within exclusive jurisdiction of federal Court held barred by findings and judgment in prior state Court fraud action).[9]

But the real burden of appellant's argument appears to be simply that the state Court erred in denying him money damages for the alleged conversion. (O.Br. 9-12.) However, it has long been clear that error provides no basis for withholding application of the principles of res judicata. The efficacy of a judgment simply does not depend upon its correctness. 1B Moore's Federal Practice 621. Indeed, the significance of the doctrine derives from this very feature: its application requires an aggrieved party to invoke his appellate remedies rather than engage in harassing and vexatious relitigation. As stated in *Rubens v. Ellis,* 202 F.2d 415, 418 (5th Cir. 1953):

> "The doctrine of *res judicata* does not depend upon whether or not the prior judgment was right. It rests upon the finality of judgments as a matter of public policy, to the end that controversies once decided shall remain in repose."

In sum, appellant's efforts to escape the doctrine of res judicata must be rejected. When those principles are applied at bar—as appellant all but recognizes in his brief—the judgment below must be affrmed.

---

[9]For additional recent cases involving federal court attribution of estoppel effect to state Court determinations see, e.g., *Flood v. Besser Co.,* 324 F.2d 590 (3d Cir. 1963); *Ballard v. First National Bank of Birmingham,* 259 F.2d 681 (5th Cir. 1958); *Lyle v. Bangor & Aroostook R.R. Co.,* 237 F.2d 683 (1st Cir. 1956).

II.

ALL CLAIMS ASSERTED AT BAR ARE NEGATED BY THE FINDINGS AND JUDGMENT ENTERED IN THE SAN MATEO SUPERIOR COURT AND THE POST-JUDGMENT REFUSAL OF APPELLANT TO REMOVE THE VESSEL.

Appellee relies upon the doctrine of res judicata in both of its familiar aspects:

(1) the principle that a prior judgment is an absolute bar to a subsequent action between the same parties upon the same claim or demand (res judicata strictly so-called), and

(2) the principle that a prior judgment constitutes an estoppel in a subsequent action between the same parties as to matters necessarily litigated and determined even though the subsequent action be upon a different claim or demand (collateral estoppel). See, *e.g.,* 1B Moore, Federal Practice 621, and authorities cited; Restatement of Judgments, §§45-72.

The first of these principles unquestionably precludes relitigation of appellant's "conversion" claim as well as his claims for "unlawful possession" and "negligence" at least so far as they relate to the period prior to the October 27, 1964 Superior Court judgment. As stated in *Flood v. Besser Co.,* 324 F.2d 590 at 591 (3d Cir. 1963):

> ". . . In such a case the plaintiff is precluded not only from asserting the grounds of complaint actually litigated in the prior suit but also all other grounds which were available to him but which were not put forward in that suit. The plaintiff may not prosecute his claim piecemeal by presenting to the court a part of his grounds and reserving others for another day. It is in the

> interest of both the nation as a whole and its individual citizens that there should be an end to litigation and that an individual should not be vexed twice for the same cause. Thus, under the doctrine of res judicata a plaintiff may not split his cause of action by claiming in his original suit a part only of the damages which he is then allegedly entitled to recover and reserving the remaining damages for a later suit. If he does so the judgment in the prior suit bars him from recovering in another suit the damages which he could have claimed, but did not, in the original suit."

Whatever meaning one may attribute to Sellick's claims of "unlawful possession" and "negligence", it is surely clear that these claims are precluded by the San Mateo judgment. That judgment rests upon the following findings:

> (1) that appellee acted in accordance with the provisions of law in attaching the boat;
>
> (2) that appellee did not willfully deprive appellant without appellant's consent of the use and possession of the boat or any other personal property;
>
> (3) that appellee did not convert the boat and did not otherwise violate plaintiff's rights in his personal property;
>
> (4) that appellee did not cause damage to the vessel by reason of the attachment inasmuch as the fair market value of the "Hazzard II" remained constant at all relevant dates through and including the Sheriff's return and the date of trial in San Mateo County;

(5) that even if Sellick's rights were theoretically invaded by reason of the attachment, appellant is estopped from seeking recovery for any injury by reason of his failure to promptly file a third party claim or, alternatively, by reason of his election to obtain release of the vessel as legal owner through a third party claim.

To be sure, appellant Sellick has been adroit enough to plead theories which may appear to involve claims distinct from those litigated in the San Mateo action. But neither the federal nor the state courts have had any difficulty in piercing pleading theory so as to apply the doctrine of res judicata to the selfsame claim. See, *e.g., Filice v. U.S.,* 271 F.2d 782 (9th Cir. 1959); Restatement of Judgments §§ 48, 61-66. The point may be illustrated by two California cases: *Wick v. Wick Tool Co.,* 176 Cal.App.2d 677, 1 Cal. Rptr. 531 (1959), and *Stafford v. Yerge,* 129 Cal.App. 2d 165, 276 P.2d 649 (1954).

In *Wick v. Wick Tool Co., supra,* rescission of a license agreement was initially sought on six specified grounds of alleged false representations. The Trial Court found that no false representations had been made in inducing the entry into the license agreement. Plaintiff tried again. In a second action damages were sought on two specified grounds involving additional false representations. But the California Court of Appeal perceived that the alleged right to recover was once again based on circumstances involved in the making of the license agreement. Accordingly, the Court held res judicata applicable notwithstanding the

fact that different relief was sought. Similarly, the bar of res judicata applied even though the two additional grounds of false representation were allegedly not discovered until after the adverse judgment in the first action became final. In the Court's view the plaintiff in the first action was obliged to allege all purported grounds of rescission discoverable with due diligence; he was not entitled to split his cause of action for relief with respect to the license agreement by presenting certain grounds for relief in the first action and thereafter presenting, in a second action, other grounds for relief.

Here, as in *Wick,* appellant has devised new theories of relief; but all are grounded in the same factual circumstances, namely, Clipper Yacht Company's alleged wrongful attachment of the "Hazzard II". Whatever theoretical artifact Sellick chooses to describe the same basic facts, he cannot escape the doctrine of res judicata.

Equally instructive is the earlier decision of *Stafford v. Yerge, supra.* There, a fraud claim with respect to the conveyance of certain oil and gas leases was repeated in two actions. In the first, plaintiffs claimed the right to royalties and demanded an accounting. In the second, plaintiff assignee of the original plaintiffs recast his action to seek declaratory relief and a determination that plaintiff was a co-tenant with certain defendants who, it was alleged, held the royalties in trust for the plaintiff. Holding that the new suit was barred by the doctrine of res judicata, the California Court of Appeal rejected plaintiff's

argument that res judicata requires an identity of theories upon which relief is sought. Invoking the well-recognized principles discussed above, the Court held that the relevant identity is between the causes of action, not the theory of relief:

> ". . . Plaintiff's request for a declaration of the rights of the parties, for a determination that he is a cotenant of the well, and that the royalties be held in trust for him, relates to the remedy by which plaintiff seeks to enforce his asserted right. This does not obviate the application of the doctrine of res judicata. (*Triano v. F. E. Booth & Co., Inc.,* 120 Cal.App. 345, 347 [8 P.2d 174]; *Panos v. Great Western Packing Co., supra,* p. 639.) Otherwise a party could keep litigating the same claim over and over so long as he, or his counsel, was ingenious enough to contrive new theories. The right or obligation here sought to be enforced is clearly the same as that adjudicated in the *Howard* case. Res judicata was therefore applicable." 129 Cal.App.2d at 171-72.

As the California Appellate Court appreciated, the purpose of both suits in *Stafford* was to obtain a portion of the royalties on the oil produced from a certain well. Although different relief was sought and new allegations were incorporated in the second complaint, the Court peremptorily ended the harassing and vexatious litigation by applying the res judicata doctrine. Here too, similar harassment must be ended and for the same reasons. Notwithstanding plaintiff's new theory of damages, he nevertheless seeks recovery for an alleged invasion of his rights in and to the "Hazzard II"—the very same set of circumstances

before the Superior Court of San Mateo County. Sellick has had his "go" at this appellee; he is not entitled to another.

Both aspects of the doctrine of res judicata preclude Sellick's efforts to pursue claims with respect to damages supposedly incurred after entry of the San Mateo Superior Court judgment. As clearly appears in Appellant's Opening Brief, the claim of "continuing damage" presupposes that the San Mateo findings are erroneous and that the issues therein determined may be relitigated in this forum. *Each and every theory upon which Sellick seeks recovery rests upon the assumption that Clipper Yacht Company perpetrated a wrongful act in connection with its attachment of the "Hazzard II"—an assumption foreclosed by the San Mateo Superior Court.* The point may be illustrated by that portion of appellant's brief concerning "conversion". Without reference to the record appellant argues:

> "If the state and federal court feels that conversion did not occur prior to the judgment of the Superior Court, County of San Mateo, then it has occurred since then as the conditional vendor has been excluded from his rights by appellee's continuing to hold the vessel. Of course, conditional vendees, the Heltons, dod [sic] not pay on the contract when they do not have the vessel." O.Br. p. 10.

But appellant nowhere explains in what manner appellee has "excluded" him from his rights as conditional vendor. The record establishes exactly the opposite to be true. Appellee has not and does not

challenge appellant's title to the vessel as legal owner. Indeed, when appellant filed his third party claim appellee honored it. Since the vessel's release to appellant on March 17, 1964—*a date preceding the San Mateo judgment by some seven months*—Sellick has enjoyed and continues to enjoy the right to take custody of the vessel and do with it as he chooses. But appellant has belligerently refused to remove the vessel insisting, instead, that the San Mateo judgment is erroneous. *As a matter of law appellant cannot have suffered any legal damage to his interests by reason of any acts or omissions of appellee. Any damages he may have incurred including any deterioration in the state of the vessel following the Sheriff's return of March 17, 1964 is proximately attributable to Sellick's own refusal to accept the necessary consequences of his own third party claim.*

Beyond the findings and the judgment of the San Mateo Superior Court looms the unquestioned fact that since March 17, 1964 Clipper Yacht Company has repeatedly asked libellant Sellick to remove the "Hazzard II" from appellee's yacht harbor facilities. Yet appellant has steadfastly refused to do so.[10] Once

---

[10]Appellee is at a loss to understand what Sellick means when he asserts that "Appellee still continues to hold the vessel, use the vessel, are allowing damage to the vessel to continue and have still not released the vessel to the Heltons." O.Br. p. 9. So far as appears in this record since June 1, 1962 conditional vendee Helton has not contacted Clipper Yacht Company or shown any interest in the vessel. Significantly, appellant has never denied that he has consistently refused to take the boat away even though asked to do so by appellee. See Reporter's Transcript of Oral Argument on October 3, 1966 before the Court below, p. 5 et seq. On November 18, 1966 appellee filed action No. 47030 against appellant in Marin County Superior Court seeking wharfage fees for the post-

again it is clear that any damages Sellick may have incurred since March 17, 1964 are proximately caused by his own failure to accept appellee's invitation to take the vessel.

In sum, the findings and judgment of the San Mateo Superior Court coupled with appellee's repeated requests to libellant seeking removal of the vessel are dispositive of all claims. No genuine issue with respect to any material fact appears in the record.[11] Accordingly, judgment was properly entered below pursuant to Rule 56 of the Federal Rules of Civil Procedure.

September 30, 1965 period, an injunction directing removal of the vessel and punitive damages. See O.Br. p. 7. Sellick appeared by way of Answer and Cross-Complaint and the matter was tried before the Honorable Thomas F. Keating, who entered his Minute Order indicating judgment for Clipper Yacht Company on June 19, 1967. On June 23, 1967 appellant Sellick filed a Petition for Removal to the United States District Court for the Northern District of California (No. 47313).

[11]The record demonstrates that libellant could not file an amended pleading complying with Judge Sweigert's interim order. The amended libel adds nothing to the original by way of fact allegations supporting any claims for the post-October 27, 1964 period; nor could it in view of appellant's own refusal to take possession of the vessel. Accordingly, the first cause of the amended libel does not and cannot provide any actionable basis, whether contractual or quasi-contractual, for a claim against appellee for the vessel's "unauthorized use". As for the second cause of the amended pleading, appellant has not and cannot allege facts showing any duty on the part of appellee to care for the vessel the breach of which might constitute negligence.

CONCLUSION

For the reasons stated herein it is respectfully submitted that the judgment below be affirmed.

Dated, San Francisco, California,
June 28, 1967.

M. Laurence Popofsky,
Curtis M. Caton,
Heller, Ehrman, White & McAuliffe,
Attorneys for Appellee.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

M. Laurence Popofsky,
Attorney for Appellee.